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No. 88-1100

In the Supreme Court of the United States

OCTOBER TERM, 1988

TENNESSEE WILDLIFE RESOURCES AGENCY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the court of appeals properly concluded that the Tennessee Wildlife Resources Agency failed to show that its mandatory retirement age of 55 for wildlife officers was justified as a "bona fide occupational qualification" under Section 4(f)(1) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623(f)(1) (1982 & Supp. IV 1986).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 859 F.2d 24. The opinion of the district court (Pet. App. 9-56) is reported at 696 F. Supp. 1163.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1988. The petition for a writ of certiorari was filed on December 31, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, the Tennessee Wildlife Resources Agency, is responsible for enforcing all hunting, fishing, and other laws relating to wildlife in the State of Tennessee. Petitioner hires and supervises all wildlife officers charged

with carrying out its law enforcement responsibilities.[1] Under Tennessee law, all wildlife officers with 25 years of service must retire at age 55. See Tenn. Code Ann. § 8-36-205(2) (1988). In July 1981, the Equal Employment Opportunity Commission (EEOC) filed an action under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, against petitioner in the United States District Court for the Middle District of Tennessee. That action challenged petitioner's forced retirement of 26 wildlife officers who had reached 55 as a violation of Section 4(a)(1) of the ADEA, 29 U.S.C. 623(a)(1), which makes it unlawful for an employer "to discharge any individual * * * because of such individual's age." Petitioner defended its mandatory retirement age of 55 as a lawful "bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of [its] particular business" (Section 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1) (1982 & Supp. IV 1986)). Pet. App. 1-2, 9-13.

2. Following a trial, the district court concluded that petitioner had established that its mandatory retirement age for wildlife officers was justified as a "bona fide occupational qualification" under Section 4(f)(1) of the ADEA (Pet. App. 9-10, 46-54).[2] In evaluating petitioner's BFOQ defense, the court purported to apply the two-part test approved in *Western Air Lines, Inc.* v. *Criswell,* 472 U.S. 400, 414-416 (1985), namely, the requirements that

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[1] Wildlife officers employed by petitioner fall into four separate classifications: wildlife officer I (entry class), wildlife officer II (assistant supervisor), wildlife officer supervisor, and wildlife enforcement coordinator (chief of law enforcement). See Pet. App. 11.

[2] The district court concluded, however, that the mandatory retirement age of 55 was not a valid BFOQ for one classification of wildlife officers—chief and assistant chief of law enforcement (Pet. App. 9-10, 54-55). Petitioner sought no further review of that aspect of the district court's decision and thus it is no longer at issue.

the employer show that the job qualification is reasonably necessary to the particular business, and that "all or substantially all persons over the age limit would be unable to perform safely and efficiently the duties of the job involved" (Pet. App. 44-45 (internal quotation marks and citations omitted)).

The court first concluded that the "primary essence of [petitioner's] business as it relates to wildlife officers * * * is that of law enforcement and the safety of the public" (Pet. App. 47), and that wildlife officers over 55 "could not adequately perform, without excessive tiring, such tasks as pursuing hunting violators up steep grades on foot, * * * and working long hours in adverse weather" (*id.* at 49). Turning to the second step of the inquiry, the court reviewed the evidence, which included testimony of wildlife officers themselves and expert witnesses, and concluded that "substantially all persons over age 55 would be unable to perform safely and efficiently the duties of wildlife officers * * *" (*id.* at 51), principally because "coronary artery disease is a significant health factor in persons over age 55" (*id.* at 52). The court also concluded that available medical tests "cannot at this time reliably determine those who can effectively and safely perform as wildlife officers and that age is the only means to ascertain those persons who can" (*id.* at 53). Accordingly, the court concluded that petitioner had shown that age 55 is a valid BFOQ for the mandatory retirement of its wildlife officers.

3. The court of appeals unanimously reversed and remanded (Pet. App. 1-6). It concluded that the district court had misapplied the first part of the *Criswell* test because petitioner "has not treated physical and coronary fitness as reasonably necessary to the position of wildlife officer" (*id.* at 4). Reviewing the record, the court found

that petitioner has "no provision for testing, evaluating, or improving the aerobic and coronary fitness of officers either under or over the 55-year limitation," and that petitioner offered "no evidence that officers over 55 who have been allowed to continue work have proved to be unsatisfactory" (*id.* at 6). In addition, the court observed that petitioner "permitted exceptions to the mandatory retirement age, not on the basis of health and fitness, but instead on the basis of the economic status of individual officers," and that petitioner admitted "that some officers were retained beyond 55 for political reasons" (*ibid.*). In sum, the court concluded that all those factors showed that "aerobic and coronary fitness have not been treated as reasonably necessary to the job of serving as a Tennessee Wildlife Officer" and that petitioner's BFOQ defense failed (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 10-17) that the court of appeals' decision misapplied the standard for evaluating an employer's BFOQ defense approved in *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400 (1985), and effectively required petitioner to overcome an insuperable burden. Section 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1) (1982 & Supp. IV 1986), provides that an employer may take age into account in making employment decisions "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." In *Criswell*, this Court endorsed a two-part standard that an employer must satisfy in order to justify its use of an age limit for employment in a certain position (472 U.S. at 414-416): (1) the employer must show that a certain trait is a bona fide and reasonably necessary qualification for the position; and (2) the employer must

show that all or substantially all employees above the age limit lack the qualification required, or that it is impracticable or impossible for the employer to identify those who lack the required trait by individual testing.

Contrary to petitioner's assertion (Pet. 14), the court of appeals hardly "distorted" the first part of the *Criswell* test. The court simply required petitioner to show that it imposes the same standards of physical fitness, the alleged basis of its BFOQ, on its wildlife officers. As the court of appeals observed (Pet. App. 5-6), petitioner permitted exceptions to its age limit, but based those exceptions on economic hardship or political considerations, not on health and fitness. And petitioner made no effort to test, evaluate, or improve the aerobic and coronary fitness of officers either under or over the 55-year limitation. Thus, by its very actions, petitioner has shown that the high levels of physical fitness asserted as the basis for its BFOQ were not considered as "reasonably necessary to the normal operation of [its] business." Without such a showing, as the court of appeals correctly held, petitioner's asserted qualification may not be considered either "bona fide" or "reasonably necessary" for petitioner's normal operations, as the statute expressly requires. Accordingly, the court of appeals' decision is consistent with *Criswell* and imposed no higher burden on petitioner than the plain language of the statute mandates.

2. Petitioner further contends (Pet. 17-20) that the court of appeals' decision conflicts with *EEOC* v. *Missouri State Highway Patrol,* 748 F.2d 447 (8th Cir. 1984), cert. denied, 474 U.S. 828 (1985), and *EEOC* v. *City of East Providence*, 798 F.2d 524 (1st Cir. 1986). In *Missouri State Highway Patrol,* which involved a challenge to the state's mandatory retirement age of 60 for police officers, the Eighth Circuit reviewed the routine duties of police of-

ficers and concluded that "[i]n light of these obligations and demands * * *, [the state] has clearly established that physical ability and ability to withstand stress are job qualifications which are reasonably necessary to the performance of [the jobs]" (748 F.2d at 451). To be sure, contrary to the court of appeals' decision here, the Eighth Circuit appears to have applied a less demanding level of scrutiny to an employer's asserted BFOQ defense. That decision, however, predates *Criswell*, where the Court made clear that the ADEA requires a more exacting standard than a "rational basis in fact." See *Criswell*, 472 U.S. at 421; see also *EEOC* v. *Pennsylvania*, 829 F.2d 392, 396 (3d Cir. 1987) ("Before a characteristic can be a reasonably necessary [qualification], it must be a trait that the employer at least attempts to require of employees of all ages."), cert. denied, No. 87-5781 (Feb. 29, 1988). Accordingly, any apparent tension between the court of appeals' decision and the *Missouri State Highway Patrol* does not call for this Court's review.

In *City of East Providence*, which also involved a challenge to a mandatory retirement age of 60 for police officers, the EEOC contended that the defendant city failed to satisfy the first part of the *Criswell* standard because the city "does virtually nothing to ensure that members of the force below age 60 meet the physical fitness standards for which it seeks to use age 60 as a proxy" (798 F.2d at 528-529). The court of appeals rejected that argument, concluding that the district court had made a "particularized factual finding that physical strength and stamina and the ability to withstand stress are reasonably necessary to the operation of the police department" (*id.* at 529-530). In addition, the court of appeals observed that "[w]hile the existence of such [physical fitness] tests reinforce the argument that physical strength and stamina are a necessary requirement, it does not follow that physical

abilities are proven to be unnecessary by the mere fact that a police department is slipshod in monitoring the health and fitness of its younger officers" (*id.* at 530).

Although the First Circuit in *City of East Providence* stressed that regular physical fitness testing is not required in order to show that an employer has established a bona fide physical fitness requirement which is reasonably necessary for a position, the court below did not impose such a requirement. To the contrary, the court of appeals in this case stressed several factors besides the absence of physical fitness tests for younger officers in support of its conclusion that petitioner had failed to establish that a high level of physical fitness was a bona fide job qualification (Pet. App. 5-6).

In any event, even if there were a clear conflict between the decisions of the Eighth and First Circuits and the decision below, that conflict would not call for this Court's review in light of a significant amendment to the ADEA. In 1986, Congress amended the statute effectively to permit state or local government employers to apply prospectively the type of mandatory retirement provision at issue in this case pending the results of a congressionally mandated study. Section 3(a)(1) of the Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342, 29 U.S.C. 623(i) (Supp. IV 1986) provides:

> It shall not be unlawful for [state and local government employers] * * * to discharge any individual because of such individual's age if such action is taken—
>
> (1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of * * * retirement in effect under applicable State or local law on March 3, 1983, and

> (2) pursuant to a bona fide * * * retirement plan that is not a subterfuge to evade the purposes of [the ADEA].

This amendment, which became effective on January 1, 1987, and remains in effect through 1993,[3] does not apply to actions such as this one, which were brought under the ADEA before the amendment's effective date. See Pub. L. No. 99-592, § 7(a) and (b), 100 Stat. 3344-3345, 29 U.S.C. 621 note (Supp. IV 1986). The amendment, however, confines the significance of the question presented here to those few actions for retrospective relief filed against state and local governments before January 1, 1987.[4] Accordingly, the amendment renders any apparent conflict among the courts of appeals over the question presented in this case a matter of diminishing importance that does not call for this Court's review.

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[3] Unless reenacted by Congress, the amendment will expire on December 31, 1993. See Pub. L. No. 99-592, § 3(b), 100 Stat. 3342, 29 U.S.C. 623 & note (Supp. IV 1986).

[4] Contrary to petitioner's representation based on the information available to it (Pet. 9), the EEOC, as of January 31, 1989, has only 12 ongoing ADEA actions involving similar BFOQ defenses against some six states or municipalities.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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